

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RODERICK DUANE LEWIS,

Plaintiff,

v.

JERI ANN SHERRY,

Defendant.

Case No. 05-74202

HONORABLE ARTHUR J. TARNOV
UNITED STATES DISTRICT JUDGE

MAGISTRATE JUDGE
PAUL J. KOMIVES

**ORDER ADOPTING MAGISTRATE'S REPORT &
RECOMMENDATION [D/ E # 37] AS TO CLAIMS III, V & VI,
WHICH WERE PREVIOUSLY HELD IN ABEYANCE**

Before the Court is the Magistrate Judge's August 31, 2006 Report and Recommendation ("R & R") relating to Petitioner's *pro se* Application for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. The Magistrate recommends that this Court deny Petitioner's Application for Writ of Habeas Corpus as to all claims.

The Court held in abeyance the portion of the Magistrate's Report and Recommendation relating to Claim III (due process claim challenging the trial court's instruction), Claim V (ineffective assistance of trial counsel) and Claim VI (ineffective assistance of appellate counsel).

The Court assigned counsel to conduct a hearing and file a brief.

A supplemental petition has been filed by counsel, a hearing has been had with trial counsel, appellate counsel and a criminal law specialist testifying. A supplementary brief was filed on behalf of Petitioner after the evidentiary hearing.

Based on the information provided, the failure to disclose a note from the jury that they thought themselves hung did not result in Constitutional error. The instruction was given after a subsequent note from the jury asking for a repeat of one of the witness's testimony. Nothing happened between the first note from the jury and the second note. Under the totality of the circumstances, the instruction was not unduly coercive.

Given the conclusion that it was not coercive, the failure to object to it or to not being shown the note is not ineffective assistance of trial counsel. Nor is the failure to raise the issue on appeal ineffective assistance of appellate counsel.

Therefore, the balance of the Report and Recommendation is ADOPTED.

IT IS SO ORDERED.

S/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: December 28, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on December 28, 2007, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Secretary